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July 23, 2008

**VIA HAND and ECF**

Hon. Theodore H. Katz  
United States District Court  
Southern District of New York  
500 Pearl Street  
New York, NY 10007

**Re: Pure Power Boot Camp, et al. v. Warrior Fitness, et al.**  
**08 Civ. 4810 (JGK) (THK)**

**THE COURT:** Well, I certainly have been wondering how your client would have had access to [the Warrior Fitness email account].

**MR. HERZFELD:** Okay. Warrior Fitness was a lucky guess. He used the same password as he did for his Hotmail account. They tried it, it worked. . . *See Trans. 17:4-9 (July 18, 2008).*

**WILLIAM SHAKESPEARE:** *Something is rotten in the state of Denmark. Hamlet, Act I, scene 4.*

Your Honor:

This firm represents Defendants in the above-referenced action. Pursuant to the Court's direction, we write to further address Plaintiffs' sanctionable spoliation of documents.

It is now undisputed that, in a shocking display of audacity and disregard for the Rule of Law, Plaintiffs stole and then attached to their Motion for a Preliminary Injunction approximately thirty-four (34) privileged and confidential e-mails that were sent from Defendants' personal computers and/or personal digital assistants, and that were drafted on their own personal time.

Most of the thirty-four (34) emails were sent or received by Defendant Fell after his employment with Plaintiffs had already terminated. Nevertheless, Plaintiffs intercepted these



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emails by eavesdropping on several of Defendants' email accounts for the sole purpose of attempting to use these entirely private communications to their advantage.<sup>1</sup>

In an attempt to hide the fact from the courts that the emails were accessed and printed after Fell's employment with Plaintiffs had terminated, Plaintiffs intentionally deleted the date and time stamp that should have appeared at the bottom of every page. Plaintiffs have now, for the first time, produced these emails in their actual form. These newly produced emails show the time when Plaintiffs' printed Defendants' emails. What remains unclear is the time that Plaintiffs actually first accessed these emails. As the Court noted at oral argument last Friday, Plaintiffs should have, but elected not to, conduct a forensic examination of their computers. *See* Trans. P. 22, lines 11-24.

Indeed, Plaintiffs have thus far failed to produce any evidence demonstrating when they first illegally accessed the Defendants' email accounts. However, some of the emails, Exhibit FF for example, were printed out within hours of their original transmission. This information is significant because it demonstrates that Plaintiffs may have been intercepting the emails at the same time that they were transmitted, thus bringing Plaintiffs' illegal behavior squarely within the ambit of the ECPA.

Plaintiffs have also, for the first time, offered the feeble explanation that the time stamps were deleted because of a "copier malfunction." This is simply beyond the pale. None of the approximately thirty-five exhibits that Plaintiffs attached to their Motion for a Preliminary Injunction exhibited any other signs of a "copier malfunction." In other words, the "copier malfunction" coincidentally seems limited to altering the **bottoms** of documents where the time and date stamps are printed. The alleged "copier malfunction" does not seem to have affected the tops and middle of any of Plaintiffs' exhibits.

In addition, the bottom portions of all of the non-email exhibits do not seem to exhibit any of the symptoms of the same purported "copier malfunction." Strangely enough, the "copier malfunction" seems to have only affected emails while all other documents seem to have been

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<sup>1</sup> Indeed, as the Court pointed out at the oral argument:

**THE COURT:** So counsel, your position is, your client, by guessing at somebody's password, goes into their personal email account after they've left her employ and prints, reads and downloads emails of theirs, and that's not conduct that violates the Stored Communications Act?

*See* Trans. 17:13-17, annexed hereto.



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printed normally. For these reasons, we urge the Court to reject this thoroughly implausible explanation for the clearly purposeful and deliberate alteration of Defendants' emails.<sup>2</sup> If in fact no "copier malfunction" occurred as claimed, then Plaintiffs and their counsel have proffered perjured testimony to this Court and must be sanctioned accordingly.

In an effort to excuse Plaintiffs' intentional alteration of Defendants' emails, Plaintiffs claim that spoliation only applies to the destruction of documents. *See* Transcr. 15:14-15. Plaintiffs are wrong. There is an abundance of caselaw holding that the significant alteration of documents constitutes spoliation. *See e.g.*, *Jung v. Neschis*, 2007 WL 5256966 (SDNY 2007) (precluding use of opinions from doctor, and precluding expert testimony based on doctor's opinions as to whether patient was suffering from Alzheimer's based in part because plaintiffs produced altered copies of tape recordings); *Great Northern Ins. Co. v. Power Cooling*, 2007 WL 2687666 (EDNY 2007) (precluding evidence regarding altered or missing turbines, where missing evidence was necessary to contest the cause of turbine's failure, which was central to case); *West v. Goodyear Tire and Rubber Co.*, 167 F.3d 776 (2d Cir. 1999) (precluding use of evidence regarding tires where tires were not preserved in "inflated" state, and were purposely deflated during the case).

In addition, Plaintiffs argued that materials precluded because they were obtained in violation of the ECPA can still be used for impeachment purposes. In fact, such documents cannot be used for impeachment purposes. *U.S. v. Wuliger*, 981 F.2d 1497 (6<sup>th</sup> Cir. 1992) (the express language in the ECPA is absolute and does not provide for an impeachment exception in civil cases).

Ultimately, the Court does not even need to reach the issue of whether Plaintiffs violated a state or federal statute. As this Court noted at oral argument, the Court has an inherent ability to impose sanctions in order prevent abuses of process, and to punish abuses that have already occurred, such as the ones perpetrated by Plaintiffs here. *See Fayemi v. Hambrecht & Quist Inc.*, 174 FRD 319 (S.D.N.Y. 1997); Trans. p. 9, lines 3-4. The Court also has broad power to prevent discovery of these materials pursuant to Fed. R. Civ. P. 26(c). It is now indisputable that Plaintiffs have committed the most egregious violations of Defendants' privacy rights by hacking into Defendants' private email accounts without any express or implied authorization. Additionally, it is patently clear that Plaintiffs have spoliated evidence and perhaps committed perjury in an attempt to cover up their misdeeds. To allow this misconduct to escape the Court's broad equitable powers of preclusion and sanctions would be tantamount to giving those who

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<sup>2</sup> This Court may wish to call Mr. Calcagano to testify as to the nature of the purported copier malfunction in order to determine the veracity of this implausible explanation.



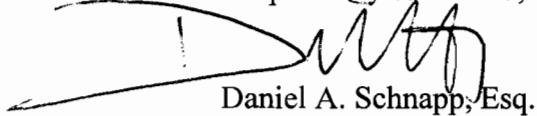
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wish to invade one's zone of privacy *carte blanche* to do so.<sup>3</sup> Accordingly, this Court must impose equitable and monetary sanctions for Plaintiffs' spoliation and discovery misconduct. *See Turner v. Hudson Transit Lines, Inc.* 142 F.R.D. 68, 77 (S.D.N.Y. 1991).

We thank the Court for its attention to these matters.

Respectfully submitted,



Daniel A. Schnapp, Esq.

cc: Hon. John G. Koeltl  
Richard L. Herzfeld, Esq. via fax (212) 986-5316

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<sup>3</sup> In remarkably similarly circumstances, Plaintiffs' misconduct has resulted in criminal prosecution. Attached is an indictment that was filed by the United States Attorney for the United States District Court, Eastern District of Pennsylvania, alleging almost the exact same activity.

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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
3 -----x

3 PURE POWER BOOT CAMP,  
4 Plaintiff,

5 v. 08-CV-4810 (JGK)(THK)

6 WARRIOR FITNESS,  
7 Defendant.

8 -----x

New York, N.Y.  
July 18, 2008  
12:09 p.m.

10 Before:  
11

12 HON. THEODORE H. KATZ,  
13 Magistrate Judge

14 APPEARANCES

15 BAHN, HERZFELD & MULTER, LLP  
16 Attorneys for Plaintiff  
17 BY: RICHARD L. HERZFELD, ESQ.

18 FOX ROTHSCHILD, LLP  
19 Attorneys for Defendants  
20 BY: DANIEL A. SCHNAPP, ESQ.  
21 ELI Z. FREEDBERG, ESQ.

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2 (In open court)  
3 THE COURT: We scheduled oral argument today on  
4 defendant's motion to preclude the use of emails that plaintiff  
5 secured on a computer at her work site. I want to just begin  
6 by saying, it's unclear right now, but probably more likely  
7 than not that Judge Koeltl's going to actually decide this  
8 motion, for the reason that obviously he's going to be deciding  
9 the preliminary injunction motion and ultimately trial issues,  
10 and it's probably more appropriate that he decide what evidence  
11 he's going to consider, and as I understand it, much of this  
12 evidence is already in front of him on the preliminary  
injunction motion.

13 MR. SCHNAPP: That's correct.

14                   THE COURT: But, you know, he and I have been in  
15 communication. He wanted us to go ahead with this hearing,  
16 have questions answered, and he'll have the transcript of this  
17 proceeding before him.

18                   How do you want to proceed? Do you want to,  
19    Mr. Herzfeld, Mr. Schnapp, do you have statements you want to  
20  make in addition to your papers or do you want to just answer  
21  some questions I have?

22 MR. SCHNAPP: Your Honor, if I may, I'd like to just  
23 briefly address what has been put in their opposition papers.  
24 I know the Court's had an opportunity to review all the papers,  
25 but I think that does bear noting, but I will not go through

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1 the entire litany of facts, but I do think that that is  
2 something that we should address here today.

3 MR. HERZFELD: I do have a few things to say, Judge.  
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4 THE COURT: okay, fine.

5 MR. SCHNAPP: So your Honor, if I may, obviously we  
6 commenced this motion because after the defendants Fell and  
7 Belliard no longer worked for the plaintiffs, it's clear that  
8 no fewer than approximately 30 to 40 emails, possibly many  
9 more, were taken from the defendants' personal email accounts.  
10 There were three email accounts at issue. There was a Hotmail  
11 account, there's a gmail account, and then there was a Warrior  
12 corporate account.

13 Now we've addressed in our papers the fact not only  
14 that they were all taken after they were no longer employed by  
15 the plaintiffs, many of the emails were drafted when the  
16 defendants no longer worked for the plaintiffs, and to the  
17 extent that any of the emails coincide in terms of time period  
18 with their actual employ, the bottom line is that these emails  
19 were written on their own personal computers, on their own  
20 personal time. Now --

21 THE COURT: Now one thing you're not in a position to  
22 say is whether they viewed or read any of these emails while  
23 they were at work using the work computer, are you?

24 MR. SCHNAPP: Are you speaking of the defendants or --  
25 THE COURT: The defendants.

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1 MR. SCHNAPP: No, your Honor, I'm not in a position to  
2 say that, although it does appear, at the very least, that all  
3 of the emails that were written during that time period were  
4 sent or received at times that it's quite unlikely that they  
5 could have been at work because they bare time stamps from the

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6 middle of the night.

7 Now in their opposition papers, the plaintiffs did not  
8 deny certain things. They did not deny the fact that the  
9 emails were stolen from an account other than the Hotmail  
10 account, specifically the gmail account and the warrior  
11 corporate account. And I think it's very telling. They have  
12 put in no evidence whatsoever to counter that obvious fact.

13 Secondly, they do argue that the Hotmail account was  
14 available to them because the defendant Alex Fell left a  
15 password on the Hotmail account. Now aside from the issue as  
16 to whether or not this is even true, the bottom line is that  
17 this in no way gave the plaintiff some kind of consent to look  
18 at his account. But even if it -- even if he did leave the  
19 password on, the plaintiffs were still required to use the  
20 password to read, to download, to print out and to ultimately  
21 read all of those emails to several of the people that were at  
22 the Pure Power facility. Certainly the consent, if any, could  
23 not possibly cover those kinds of actions.

24 And I'd also say that the plaintiffs for the first  
25 time have just produced an alleged workplace policy, but the

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1 workplace policy certainly does not cover the fact that emails  
2 are taken after the defendants are no longer in the plaintiff's  
3 employ.

4 And the last thing that I think --

5 THE COURT: Do you concede that it covers the emails  
6 that were written while they were at the --

7 MR. SCHNAPP: If in fact the policy existed, I would  
8 concede that the policy would cover emails that were sent or

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9 drafted during the time, or accessed during the time period  
10 that plaintiffs were actually in the employ. But it can go no  
11 further, and it certainly does not survive postemployment.

12 And I think the other very curious thing is that they  
13 have not even really dealt with the issue of spoliation of the  
14 evidence. All of the emails have the time and date erased, and  
15 I think that that is a -- aside from the fact it's an obvious  
16 alteration of the evidence, I think that the fact that they've  
17 done that is very telling. I think they did that precisely  
18 because they did not want it to become apparent when and how  
19 they were actually able to acquire these emails.

20 And I want to just say one last thing, which is that,  
21 there are emails that simply defy how it's possible that they  
22 had gotten their hands on them. I mean, there are emails that  
23 are between people such as defendant Baynard and defendant Lee.  
24 These people have never even stepped -- they have never used a  
25 Pure Power computer. It's just inconceivable how they were

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1 able to get the emails. Now there is some suggestion -- and I  
2 don't know for sure, but there is some suggestion that there  
3 was a use of a keystroke program. But aside from that, we have  
4 no idea how else they may have gotten their hands on those  
5 emails.

6 So the bottom line is that all of the emails were  
7 taken after they left. That was when their expectation of  
8 privacy was at its height. There was -- those emails were not  
9 taken while they were in the plaintiff's employ; accordingly,  
10 any kind of workplace manual they have cannot control.

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11 Thank you.

12 THE COURT: Just a few questions.

13 MR. SCHNAPP: Sure.

14 THE COURT: Recognizing that these emails were viewed  
15 subsequent to having been sent, when they were in storage,  
16 correct, what's the authority for arguing that these would be  
17 covered by the ECPA versus the Stored Communications Act?

18 MR. SCHNAPP: Yes, your Honor, it's a good question.

19 I think the first issue is that the Court is granted broad  
20 discretion to decide how to deal with the emails, whether it's  
21 under a federal or a state statute. Now, for example, the  
22 Court could decide that because of the spoliation of the  
23 emails, the emails should be precluded from use. The Court  
24 could decide that based upon the fact that some of the emails  
25 are attorney/client privileged, they should not be in use.

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1 With respect to the actual federal statutes, in  
2 respect to the ECPA, the bottom line is that if you take off  
3 the time and date, it's difficult for us to know, without  
4 getting certain Medidata, exactly when it was that you hacked  
5 into the computer. For all we know, for the emails that were  
6 drafted after the defendants were no longer in their employ,  
7 those emails were in fact taken contemporaneous with their  
8 transmission. And not only that, but the -- I actually should  
9 point out that in our papers we've addressed the number of  
10 emails, and many of them, in fact, the bulk of the emails were  
11 taken after they left. So it is entirely possible they were  
12 taken during the transmission.

13 THE COURT: But would you concede if they were not  
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14 taken during the transmission that the Stored Communications  
15 Act would be the applicable statute?

16 MR. SCHNAPP: I would agree that the ECPA covers  
17 transmissions that were sent contemporaneously, so yes, if as  
18 an evidentiary matter it is found that they were not  
19 intercepted at that precise moment or within a -- some  
20 contemporaneous period of time, I agree, the ECPA may not cover  
21 it. However, the CPLR does cover it. The CPLR has no  
22 requirement that the transmission be contemporaneous. And even  
23 the plaintiffs try to get around that by trying to read in some  
24 kind of a contemporaneous requirement into the state statute.  
25 But that doesn't exist. The state statute is silent on that

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1 point. In fact, if they were taken at any time, the state  
2 statute would mean that they would be precluded from use at the  
3 hearing.

4 THE COURT: The state statute precludes the use of  
5 such email?

6 MR. SCHNAPP: Yes. The state statute is almost  
7 entirely like the ECPA but does not include the contemporaneous  
8 aspect.

9 THE COURT: Why should the state statute apply in  
10 federal court, in terms of remedy?

11 MR. SCHNAPP: Because the state statute incorporates a  
12 substantive rule. It is -- CPLR 4506 speaks to the New York  
13 penal statute. The New York penal statute can control in this  
14 proceeding. Not to mention the fact that many of the claims  
15 that are at bar are state claims. In fact, there's only one

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16 claim that I know offhand that is actually a federal claim,  
17 which is the Lanham Act claim. And --

18 THE COURT: But isn't the admission of evidence in the  
19 federal court a federal question?

20 MR. SCHNAPP: Your Honor, we -- we can submit a  
21 supplementary brief, if the Court requires, showing that the  
22 state suppression remedy could apply and does apply to this  
23 proceeding. And even though the CPLR in many respects does  
24 cover certain procedural requirements that are germane to state  
25 court, it does not mean that, to the extent that there is a

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1 substantive requirement, it cannot have bearing on the federal  
2 proceeding.

3 THE COURT: But aren't you essentially asking the  
4 Court to exercise equitable power?

5 MR. SCHNAPP: Yes, your Honor, absolutely we are.  
6 Absolutely.

7 THE COURT: In that regard, how do you address the  
8 issue that virtually all of these emails would otherwise have  
9 been discoverable in this case if sought in discovery?

10 MR. SCHNAPP: Well, your Honor, I assume for the  
11 moment we'd be putting aside the issue of what emails are  
12 privileged.

13 THE COURT: Right.

14 MR. SCHNAPP: Well, we have cited cases, first of all,  
15 that do speak to whether or not certain emails or  
16 communications would be permitted in discovery, and we do think  
17 there is some caselaw in our papers that says that if it is  
18 found that they are taken illegally, that they would not be

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19 available in discovery.

20 But I think that the ECPA and the Stored  
21 Communications Act and the CPLR speak to the use of the emails  
22 at a hearing. So even aside -- if the Court decides that it  
23 doesn't want to exercise its broad discretion in limiting  
24 discovery some way, which of course we respectfully urge the  
25 Court to do, but even if it does not, then the bottom line is

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1 that the statutes themselves speak to the use of intercepted  
2 communications in hearings, so I think the idea is that even if  
3 ultimately the case gets into the discovery phase and it's not  
4 dismissed -- and incidentally, we have just recently filed a  
5 motion to dismiss -- but even if it's not dismissed, in terms  
6 of the motion for preliminary injunction and in terms of a  
7 trial or a hearing, the statute speaks specifically to those  
8 events and says that those emails, because they were  
9 intercepted illegally, cannot be used.

10 THE COURT: What does use mean in this context? Does  
11 that mean that they can't be used for impeachment purposes  
12 either?

13 MR. SCHNAPP: Your Honor, I would agree -- I don't  
14 know, because it does say at a trial. I think it would cover  
15 impeachment. I think it's broad enough to discover  
16 impeachment, it's broad enough to discover -- I'm sorry --  
17 broad enough to cover impeachment, broad enough to cover  
18 something that was submitted on direct testimony. I don't  
19 think the statute parses it out so it speaks to impeachment.

20 THE COURT: So theoretically --

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21 MR. SCHNAPP: Yes.

22 THE COURT: -- if your client was questioned on the  
23 stand about whether he secured and transmitted some of the  
24 plaintiff's business information and he said no, he could not  
25 be confronted with these, under your theory?

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1 MR. SCHNAPP: Yes, your Honor, that's the way we read  
2 the statute. The statute does not parse it out by impeachment  
3 or how exactly; it just says at a trial or hearing. It's -- I  
4 think the analogy is one to, in a criminal case, where, if a  
5 defense lawyer asked that certain evidence be suppressed  
6 because it's fruit of the poisonous tree, it's evidence taken  
7 in contravention of the Fourth Amendment, theoretically that  
8 evidence is then suppressed, it is not available for use at  
9 trial, and I think that that is what this statute in some sense  
10 analogizes.

11 THE COURT: But even under the Fourth Amendment,  
12 there's an inevitable discovery rule which allows the use of  
13 information that would otherwise be discoverable even if it was  
14 obtained in violation of the Fourth Amendment.

15 MR. SCHNAPP: Your Honor, it may be, except that the  
16 statute does not speak to that. The statute is explicit in  
17 saying at a trial or a hearing and there's no -- as far as I  
18 know, there is no exception whatsoever.

19 There's no -- there is no inevitable discovery rule in  
20 the ECPA or in the SCA.

21 THE COURT: Well, the SCA doesn't have a preclusion  
22 privilege, correct?

23 MR. SCHNAPP: That is correct, your Honor.

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24 THE COURT: So it would have to be the ECPA.

25 MR. SCHNAPP: Yes, your Honor.

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1 THE COURT: And you've pretty much conceded that if  
2 these were not seized while in transmission, that doesn't  
3 apply.

4 MR. SCHNAPP: Your Honor, I only -- I agree that  
5 the -- I just want to be clear about that. The ECPA would not  
6 apply only to emails that were taken outside of the period of  
7 what is contemporaneous, and again, we -- because of the  
8 spoliation of the evidence, because we know that it appears  
9 that the plaintiffs were monitoring our email accounts  
10 throughout the entirety of our time there, it's very likely --  
11 and it may be that we need an evidentiary hearing or we need  
12 discovery on this issue -- it's very likely that in fact these  
13 were taken contemporaneously, but if it does -- I do concede  
14 that the statute has a contemporaneous requirement, yes, that  
15 is absolutely correct.

16 THE COURT: So just to nail this down on the  
17 preclusion, defendant Lee is testifying, and are you saying  
18 that she could not be questioned about emails sent by her to  
19 defendant Fell if those emails were produced as part of the  
20 discovery that she was required to produce?

21 MR. SCHNAPP: Yes, your Honor.

22 THE COURT: Because they would also be the same emails  
23 that were found when Fell --

24 MR. SCHNAPP: Absolutely, your Honor. If they found  
25 to have violated one of the statutes that we discussed, the

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1 statute speaks to the availability or the use of those, of that  
2 evidence at trial or a hearing. Therefore, it could not be  
3 used. And again, there is no -- there is no inevitable  
4 discovery rule in the statutes. And again, there's no  
5 inevitable discovery rule in the CPLR statutes, and again, to  
6 the extent that the CPLR controls here and we're not speaking  
7 of things that were taken in a contemporaneous time frame, the  
8 CPLR would, at the very least, bar the entirety of emails,  
9 whether or not they were taken in the contemporaneous time  
10 period.

11 THE COURT: Okay. Mr. Herzfeld.

12 MR. HERZFELD: Thank you, Judge.

13 Let me jump around a little bit. Let me discuss  
14 impeachment first so I don't forget it. I didn't focus on it.  
15 I do have one case -- I don't have it with me, I don't have the  
16 cite -- that says you can use it for impeachment. I'll provide  
17 it to the Court on Monday, if you'd like.

18 THE COURT: Sure.

19 MR. HERZFELD: And my recollection of criminal law is,  
20 even if it's suppressed, defendant gets up and testifies, "I  
21 didn't do it," you can impeach him. So as far as impeachment  
22 goes, I think it's perfectly appropriate, but I don't think you  
23 have to get to that because I don't think any of these are  
24 going to be suppressed.

25 The ECPA, I'm still not sure if they're asserting that

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1 or not. In their memorandum of law -- I was preparing this  
2 morning -- they're asserting that all of these emails were  
3 taken about a month after the defendants left, end of April of  
4 '08. That's certainly not contemporaneous for the nine months  
5 before that, it's not contemporaneous for probably 99 percent  
6 of the emails before you. And I find it hard to believe that  
7 if in fact this were being monitored on a constant basis over  
8 those nine months, Ms. Brenner wouldn't have fired them  
9 immediately. She's going to sit back and watch them do what  
10 they did and do nothing about it? I don't think that's going  
11 to happen.

12 As far as --

13 THE COURT: Well, what is the explanation for why the  
14 emails have dates and times omitted?

15 MR. HERZFELD: I was going to get to that, Judge, and  
16 I don't have an explanation for that. What I do have are the  
17 actual emails with the date and time, which I can provide to  
18 the Court.

19 THE COURT: You do have them.

20 MR. HERZFELD: I do have those. Those were not  
21 destroyed. They were not altered. I don't know why prior  
22 counsel put it in like that. I didn't ask him. There's a  
23 dispute going on between plaintiff and counsel. I really  
24 didn't feel like getting into that with him. But I've got  
25 them, and they all bear out April 28th as roughly the first

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1 one, which was just what Ms. Brenner said, a month after they

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2 left. That's when they found out that the password and the  
3 user ID was embedded into the computer, and that's when they  
4 looked at them, and that's when they printed them out.

5 THE COURT: So have you provided those yet to --

6 MR. HERZFELD: I haven't, because, I mean, what  
7 they've argued here -- and I want to address that too because  
8 I'm a little bit concerned. Their argument is that because of  
9 spoliation, this Court should sanction us and preclude emails.  
10 They're not arguing, or they didn't argue before, that the  
11 Court should take any adverse inference. Had they argued that,  
12 I would have produced them immediately. But they're arguing  
13 spoliation. There's no spoliation here.

14 First of all, for spoliation, you have to show  
15 destruction. There's no destruction here.

16 Second of all, for spoliation, you have to show  
17 relevance. They've acknowledged that the emails were taken a  
18 month after. So how is it relevant what the date and print  
19 time is? Even if the date and print time were contemporaneous  
20 with the transmission, all that shows is that they were  
21 vigilantly monitoring the account. You're not going to be able  
22 to print out, monitor and print out; you simply access the  
23 account, you see what they did and you print it out. It's  
24 going to show them absolutely nothing. I'm happy to provide  
25 it, I have no problem with it at all, I'll do it on Monday,

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1 but...

2 THE COURT: So were they all printed out on the same  
3 date?

4 MR. HERZFELD: No. I believe all of the ones up to  
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5 that date were most likely printed out on that date.

6 Is that true?

7 THE PLAINTIFF: Am I allowed to speak?

8 MR. HERZFELD: You can tell me.

9 (Plaintiff and counsel conferring)

10 MR. HERZFELD: Over a period of time, Judge. About a  
11 week. I mean, the dates and times are on all of them. I have  
12 no idea why counsel did that. I can guess maybe --

13 THE COURT: But all of the dates are subsequent to the  
14 term of their employment.

15 MR. HERZFELD: Absolutely. Subsequent to their  
16 termination, yes.

17 One other thing I'd like to point out about the  
18 emails, in case it becomes an issue, first of all, they assert  
19 that we haven't addressed the other two email accounts. We can  
20 if you like, Judge, but from my perspective, this is their  
21 burden of proof. If they're talking about warrior Fitness, if  
22 they're talking about Lee's account, warrior Fitness,  
23 specifically Belliard, who's silent throughout this whole  
24 thing, as I think the Court recognizes, and Lee, have to come  
25 in and say there was no consent before you can sanction access

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1 to the email account. And they haven't done that. If the  
2 Court wants an explanation, we can give the Court an  
3 explanation.

4 THE COURT: Well, I certainly have been wondering how  
5 your client would have had access to that.

6 MR. HERZFELD: Okay. warrior Fitness was a lucky

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7 guess. He used the same password as he did for his Hotmail  
8 account. They tried it, it worked.

9 Lee, she gave Fell her email address, or her password  
10 and user name in an email, which they accessed, so they had  
11 that, on Hotmail. That's how they got it. I have the email  
12 that shows the password and user name, if the Court wants it.

13 THE COURT: So counsel, your position is, your client,  
14 by guessing at somebody's password, goes into their personal  
15 email account after they've left her employ and prints, reads  
16 and downloads emails of theirs, and that's not conduct that  
17 violates the Stored Communications Act?

18 MR. HERZFELD: Well, first of all, Judge, that's not  
19 exactly our position. All of the emails from Fell were  
20 because, A, he left his password and his user name in the  
21 computer at Pure Power, and, B, because he actually gave his  
22 password to one of the Pure Power employees at a prior time.

23 THE COURT: Well, but --

24 MR. HERZFELD: As far as Lee goes, as far as Warrior  
25 Fitness goes, the only argument I have with respect to that and

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1 the Stored Communications Act is the crime-fraud exception to  
2 confidentiality, which we would submit applies here. The whole  
3 purpose of the Stored Communications Act, ECPA, CPLR 4506 is an  
4 expectation of privacy, and once -- and the same is true for  
5 attorney/client privilege. But once you engage in a crime, in  
6 fraud, in breach of fiduciary duty, all of which they were  
7 doing, we submit that any prohibition under the SCPA [sic]  
8 would not apply, and even if it did, then you've got to get to  
9 your equitable powers and you've got to balance what was going

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10 on against what was done, and what --

11 THE COURT: So I understand on the equitable side,  
12 you're basically saying they don't have clean hands.

13 MR. HERZFELD: Yes, Judge.

14 THE COURT: You're saying that that doctrine applies  
15 with respect to the statutory prohibitions of entering into  
16 somebody's private email account and reading their emails?

17 MR. HERZFELD: No, to the sanctions which would apply.  
18 The SCA does not have a preclusionary clause, despite counsel's  
19 argument to the contrary in his brief. The ECPA doesn't apply.  
20 And 4506, quite frankly, doesn't apply, and I'll tell you why  
21 45 -- I'll address my --

22 THE COURT: But would you concede that it would be a  
23 violation of the SCA to do that, to do what's been described?

24 MR. HERZFELD: As far as Lee and Warrior Fitness goes?

25 THE COURT: Yes.

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1 MR. HERZFELD: Only if you disagree with my argument  
2 that the crime-fraud, fiduciary duty breach would be an  
3 exception to that.

4 THE COURT: Okay. Let's talk about Fell. Why is that  
5 not a violation of the statute?

6 MR. HERZFELD: Of the SCA?

7 THE COURT: Yes.

8 MR. HERZFELD: From the outset? Well, basically, for  
9 several reasons. One is consent.

10 THE COURT: You're saying because he -- although he  
11 says he didn't do this, let's assume he inadvertently left his

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12 password embedded in his Yahoo account and it came up. You're  
13 saying by doing that, he was consenting to anybody clicking on  
14 that account and reading his emails?

15 MR. HERZFELD: That's one of the things I'm saying,  
16 but Judge, what's very interesting, and perhaps I missed it,  
17 but I don't see in Fell's affidavit where he denies doing that.  
18 He says all of the emails that he sent that are at issue here  
19 were sent from his home computer, off hours, and I don't see a  
20 statement that says he did not use the computer, which he's  
21 acknowledged in state court, or that he left his password and  
22 his email address behind. I know counsel --

23 THE COURT: Okay. So let's assume he used it, but you  
24 will agree that we don't know that he used it to write these  
25 emails, correct?

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1 MR. HERZFELD: That's true. I don't concede it, as  
2 counsel suggests, but I don't know.

3 THE COURT: But you don't have any evidence that he  
4 did.

5 MR. HERZFELD: No.

6 THE COURT: Okay. So at some point he uses the  
7 computer, and perhaps he uses the computer while he's at work  
8 to read personal emails on his Yahoo account, which is not your  
9 client's email system. Correct?

10 MR. HERZFELD: True.

11 THE COURT: And his personal password is embedded,  
12 comes up automatically as a memory, comes up when Yahoo is  
13 opened. By doing that, he's consenting to anybody who wants to  
14 going into his email account and read both emails that are

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15 there at the present time and emails that are going to be sent  
16 to him subsequently?

17 MR. HERZFELD: I would argue yes, but there are other  
18 arguments as well. I would argue yes because, first of all, as  
19 far as consent goes, it's not limited to employer-provided  
20 servers. There's a federal case we cite, which I don't recall  
21 off the top of my head, which was cited in Scott, deals with  
22 private email accounts, and the company policy is that anything  
23 you put into the computer, leave in the computer is the  
24 company's. You forfeit any right of privacy. What I  
25 analogized it to in my memo, Scott analogizes using --

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1 THE COURT: Yeah, but he didn't put his entire Yahoo  
2 email account onto her computer. You have to do something to  
3 bring it up on her computer --

4 MR. HERZFELD: That's true.

5 THE COURT: -- correct? Actually, we're talking about  
6 Hotmail.

7 (Plaintiff and counsel conferring)

8 MR. HERZFELD: I'm sorry, Judge.

9 THE COURT: I said he didn't leave all of his emails  
10 opened to be viewed and read, downloaded onto that computer.

11 MR. HERZFELD: No, but I don't believe in Scott or  
12 the --

13 THE COURT: There's a Hotmail site, you have to do  
14 something to get into it, and then you have to take some  
15 affirmative action to read his emails, correct?

16 MR. HERZFELD: Yes, Judge, but the point is that the

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17 company policy says if you use it, then it's subject to review,  
18 everything's subject to review, and that's what they -- How are  
19 they going to be able to parse out what he did off hours and on  
20 hours? Can't be done. But we know he used it. He doesn't  
21 deny it. He admitted it in state court. We have Lorenzi's  
22 affidavit that said he used it frequently. He doesn't refute  
23 that. So we know he used it, we know he used it often.

24 Just briefly, to the extent that they argue that  
25 company policy's been waived, because they used it often, the

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1 affidavits, both Brenner and Lorenzi, is that he used it when  
2 Brenner wasn't around. She had no idea it was going on. So  
3 the fact that there was unauthorized use certainly doesn't  
4 constitute a waiver.

5                   Getting back to the consent issue, as I said, it's not  
6 limited to an employer server. It can be a private email  
7 account. And when the company policy says, if you use it, it's  
8 going to be subject to our auditing, our review, there's no way  
9 you can tell what was done unless you look at the emails. So  
10 it's fair game.

11                           THE COURT: Well, there is a way to tell if you want  
12 to do a forensic examination of the computer, which you  
13 apparently didn't do.

14                           MR. HERZFELD: In what respect, Judge? They had  
15 access to the premises at all hours, so how are we going to  
16 tell --

17                   THE COURT: Well, a forensic exam, number one, you  
18 know whether or not he actually downloaded something on the  
19 computer. You can find that out. There's a great deal of  
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20 information that's available in terms of time, when something  
21 is done, what was downloaded. There was no attempt to find  
22 that out.

23 MR. HERZFELD: No, Judge.

24 THE COURT: So we don't know.

25 MR. HERZFELD: And then the other issue, of course, is

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1 the, again, the crime-fraud --

2 THE COURT: And also, if he actually opened an email  
3 on the computer, then Medidata may actually have an image of  
4 that. But if he simply read an email on his Hotmail account  
5 and closed the account, you're saying that therefore his entire  
6 Hotmail account, he's consented to his employer viewing all the  
7 emails on his Hotmail account?

8 MR. HERZFELD: Yes, Judge. I was also --

9 THE COURT: Even if those emails are created after he  
10 left his employer's employ.

11 MR. HERZFELD: I'm sorry?

12 THE COURT: Even after he left the employ of your  
13 client?

14 MR. HERZFELD: In that respect, because he left his  
15 password and his user ID behind, we would argue that, yes, that  
16 constitutes a continuing consent.

17 THE COURT: If he left a credit card on the desk,  
18 would she be free to use that too?

19 MR. HERZFELD: No. But as I said, it's almost  
20 equivalent to him leaving a file of papers behind, and you open  
21 up the file, and that's what you -- you look what's in the

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22 file. Instead it's on the computer.

23 Also, again, we get back to the crime-fraud, breach of  
24 fiduciary duty issue, and the fact that if you're going under  
25 the SCA, if you conclude it's a violation of the SCA, you still

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1 have to decide what to do about it. And given what was going  
2 on, I don't think it -- and we've got at least one federal case  
3 that indicates where the plaintiff did something wrong, the  
4 defendant did something wrong, the Court basically washed its  
5 hands of it and said no sanctions.

6 THE COURT: But the problem is, what you're saying  
7 they did wrong goes to the underlying claims in the litigation,  
8 which the Court has yet to decide. So at this point the Court  
9 doesn't know whether something they did was improper or  
10 illegal. You're alleging that as part of the complaint.

11 MR. HERZFELD: I'm alleging that as part of the  
12 complaint, but the emails document that wrongdoing, and a lot  
13 of the allegations are simply not denied. The allegations that  
14 Belliard shredded his noncompete, not denied; the allegations  
15 that Lee and Baynard acted as corporate spies, not denied.

16 THE COURT: I thought Fell denied ever having a  
17 noncompete.

18 MR. HERZFELD: Fell denies having a noncompete;  
19 Belliard does not. Belliard admitted that he did have a  
20 noncompete, and the email documents, that it was shredded.

21 THE COURT: Those were what, those were electronic  
22 documents on your client's --

23 MR. HERZFELD: No, those were physical documents that  
24 were taken. The electronic documents were, among other things,

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25 the customer lists, the employee manual, the startup manual,

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1 physical documents.

2 THE COURT: I see.

3 MR. HERZFELD: As far as 4506 goes, Judge, the  
4 statute's virtually identical to the ECPA. It's got the same  
5 definition of electronic communications, same definition of  
6 intercept, the same analysis applies. The federal cases look  
7 to the fact that you've got to intercept, the electronic  
8 communication definition is a transmittal, so the courts  
9 conclude that intercept.

10 And lastly, if you take a look at the statute, Judge,  
11 it applies only to state courts. The preclusion is in any  
12 court or -- of this state or any subdivision thereof.

13 THE COURT: The CPLR?

14 MR. HERZFELD: Yeah. So by its definition, it  
15 wouldn't apply to this court.

16 Unless you have any other questions, Judge...

17 THE COURT: I don't think I do.

18 MR. SCHNAPP: Your Honor, may I just briefly address  
19 some of counsel's arguments?

20 THE COURT: Yes.

21 MR. SCHNAPP: I think that we now know, and it's been  
22 represented on the record, that all of these emails were taken  
23 after the defendants no longer worked for the plaintiffs. So I  
24 think that the question here is, where do we draw the line on  
25 privacy and employee manuals. As your Honor pointed out, if I

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1 leave my credit card behind, does that mean that after I leave,  
2 you can just take my credit card and use it?

3 I think that they've argued that there's an employee  
4 manual in place, and maybe that's true for the time period they  
5 were actually in the employ, but this cannot, does not cover a  
6 time period after they no longer worked for plaintiffs. If we  
7 were to adopt that rule, then people could -- the right of  
8 privacy would essentially be abrogated everywhere and in every  
9 setting.

10 THE COURT: But let me ask you something.

11 MR. SCHNAPP: Yes.

12 THE COURT: Ms. Brenner, the evening that your client  
13 leaves his job, she finds out -- and I'm just surmising, I'm  
14 not saying this is a fact, but I think it's been claimed --  
15 she's told by an employee that your client's in her office when  
16 she's not there, going through her computer and files when he's  
17 not supposed to be there, and she comes back to her office and  
18 ascertains that he's stolen documents from her office and from  
19 her computer. She goes on to another business computer and his  
20 email account comes up. Are you saying under those  
21 circumstances she should not be doing anything, in light of  
22 what she's just found out about stolen documents?

23 MR. SCHNAPP: Your Honor, I know at the very least,  
24 even in that limited set of facts, which I don't agree occurred  
25 here, but even if it does, it certainly does not give her a

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1 right, 30 days later, to use that password that was allegedly  
2 left on the computer, to hack into not only the corporate  
3 account, the gmail account, but we even had emails that were  
4 taken from a BlackBerry wireless device. So if those emails --  
5 if there's a workplace policy in place and on that evening that  
6 she finds out that -- and she goes on to a Hotmail account, I  
7 do submit that it does not give you permission to download,  
8 read, access, read all those emails out in public, but I know  
9 at the very least, it does not give you the right a month later  
10 to come in and take any emails you want and try to use -- and  
11 try and take passwords and hack into other accounts. That --  
12 that I know for sure is on point.

13 THE COURT: So under that scenario, you might see a  
14 distinction between categories of emails that are on this list.

15 MR. SCHNAPP: I see a distinction for categories that  
16 were drafted during the time period that Fell -- only for  
17 Fell's emails while he worked for plaintiffs, only if in fact a  
18 policy was in place. All of the cases that were cited by the  
19 plaintiffs involve a policy that was in place and/or emails  
20 that were drafted during the time period that the defendant  
21 worked at the plaintiff's place of employ. And I would also  
22 add that in all of those cases, all of those emails were  
23 drafted using the company's server, the company's email  
24 exchange and on company time. Here we have -- here we have  
25 Fell drafting emails on his own home computer at a time when he

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1 was not in the office, not in plaintiff's place of employ.  
2 I want to also address the crime-fraud exception. The

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3 crime-fraud exception does not apply to the SCA. Counsel has  
4 not cited any caselaw where it does. He's trying to read in  
5 something that is in another common law for release of  
6 attorney/client privilege into the SCA. We're unaware of any  
7 provision in the SCA that actually speaks to crime or fraud.  
8 But as your Honor has pointed out, the entire argument they're  
9 making is outcome-determinative. They're basically saying,  
10 well, because we found -- because we hacked into your email  
11 accounts after you left and we found something that we think --  
12 although we deny it -- constitutes wrongdoing, somehow we're  
13 able to kind of take a step back and say, well, it's  
14 crime-fraud, we're able to do it in the first place. That  
15 doesn't make sense. The Court has to start at the starting  
16 line, which says, what is the right of privacy, what are they  
17 allowed to do, is there a manual in place, what time period  
18 does it cover. We can't look into the actual emails and  
19 determine, what are the merits of the emails and then decide  
20 whether or not the right to privacy was abrogated.

21 In addition, I want to point out that counsel has  
22 again raised the issue of the CPLR, and again, not only does  
23 it -- it does apply to this proceeding, but in addition, he  
24 has -- in his brief and perhaps also today, he has said, well,  
25 the federal statute should -- basically the federal statute, we

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1 should read the contemporaneous requirement into the CPLR, and  
2 again, it just -- it's not there and there is -- he hasn't  
3 cited any caselaw, nor could he, that such contemporaneous  
4 requirement exists in the CPLR.

5 I think ultimately the bottom line is, there's no  
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6 question, it's now on the record, we now all agree that all of  
7 the emails were taken after the defendants had long gone from  
8 plaintiff's place of employ. I think if it's to happen that  
9 somehow they're able to have these emails and use them in the  
10 context of this proceeding, then the right of privacy, it  
11 just -- it doesn't exist anymore.

12 And I would add lastly that counsel has agreed that  
13 the Court has broad discretion to fashion a remedy, and I think  
14 the Court should do so.

15 Thank you.

16 MR. HERZFELD: Just a couple things, Judge, and I  
17 should have mentioned this before.

18 To the extent that the Court decides the issue of the  
19 emails based upon whose email account it came from, one of the  
20 critical emails, Exhibit X, is the party list email. That,  
21 based upon what was submitted as Exhibit X, would appear that  
22 it came from a Baynard account, which was not the case. In  
23 fact, it was part of a chain of an email that was again taken  
24 from Fell's account. So I just don't want the Court to, if it  
25 decides that it's based upon the account, to think that that

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1 was not a Fell email. In fact, it was, and I can provide the  
2 Court with the initial page that shows that.

3 As far as 4506, counsel's right. I don't have any  
4 cases. I have federal cases. There are no state cases. So  
5 the Court's got to decide as an issue of first impression  
6 whether those federal cases and the theories that they espouse  
7 apply to the state statutes, which are exactly the same as the

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8 federal statutes. If it even wants to bother, since 4506, by  
9 its own terms, applies to state courts.

10 Other than that, I have nothing further.

11                   THE COURT: Doesn't it also, for the remedies,  
12 contemplate that there's a cause of action pursuant to that  
13 statute?

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1 THE COURT: One additional question.

2 MR. SCHNAPP: Sure.

3                   THE COURT: If we're proceeding on the basis of the  
4        Stored Communications Act, which doesn't specifically provide  
5        for preclusion, and you're simply relying on an equity, I mean,  
6        there are other remedies for this violation if it occurred, are  
7        there not?

8 MR. SCHNAPP: Yes.

9 THE COURT: The statute itself provides remedies.

10 MR. SCHNAPP: Yes, your Honor. I would agree that the  
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11 text of the SCA does not speak to an actual preclusion remedy.  
12 I think that it is relevant because it does speak to issues of  
13 equity.

14 Now I would also say that, you know, obviously SCA  
15 provides a counterclaim, which of course, you know, if in fact  
16 the motion is not dismissed and -- or one way or the other, we  
17 intend to pursue that counterclaim.

18 THE COURT: Right now, though, there is no  
19 counterclaim.

20 MR. SCHNAPP: No. Right now because of the motion to  
21 dismiss, there is no counterclaim.

22 THE COURT: What was the basis of the motion to  
23 dismiss?

24 MR. SCHNAPP: It was all based upon 12(b)(6), each and  
25 every one of the causes of action failed to allege, whether it

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1 was in detail, whether it was just to lay out the basic  
2 elements of causes of action, how those causes of action exist,  
3 I think there is, also, as part of that, we are seeking relief  
4 under Rule 12(d) because we think that based upon some of the  
5 exhibits that have been put in, it assures that the Court can  
6 dispose of this case on a summary basis. That's the basis of  
7 the motion.

8 THE COURT: Thank you.

9 MR. SCHNAPP: Yes, your Honor.

10 THE COURT: Anything else?

11 MR. HERZFELD: Just one other thing, Judge.

12 As far as the Court exercising its equitable powers, I

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13 mean, obviously you're not going to decide the case on the  
14 merits, but you do have to weigh what's been alleged and what's  
15 before you and the harm to each of the parties if it's allowed  
16 or not allowed, and I think at the end of the day, especially  
17 based upon their failure to deny a number of these very serious  
18 allegations, I think that analysis has to come out in favor of  
19 the plaintiffs.

20 MR. SCHNAPP: Your Honor, may I just briefly respond  
21 to that?

22 THE COURT: Sure.

23 MR. SCHNAPP: I just want to say that it's just, you  
24 know -- they say we haven't -- we haven't dealt with their  
25 allegations. Your Honor, again, if our privacy rights were

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1 invaded and the Court is going to fashion an exclusionary  
2 remedy, we have no obligation and nor should we address any of  
3 the merits of what's in the email. We cannot reverse engineer  
4 this process to suit the plaintiffs. The process is such that  
5 you look to see whether or not the right was breached. If it  
6 was breached, the emails are excluded. That's all.

7 THE COURT: I haven't read the papers but, I mean,  
8 have you addressed the merits of the allegations in the  
9 preliminary injunction?

10 MR. SCHNAPP: In part we have, your Honor. I mean, I  
11 can say at the very least, we, you know -- if it is not clear  
12 in the papers, we deny each and every allegation of wrongdoing.  
13 But I do think in part we have dealt with some of the documents  
14 in particular. If it's not in our motion on the emails, it's  
15 in our motion on the injunction. Where, for example, you know,

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16 they raise certain emails as being, you know, alleged client  
17 lists, and we just point out they were nothing of the sort.  
18 But it doesn't change the fact that, again, the process doesn't  
19 work that way. It's -- you have to look to see whether or not  
20 a right was breached, and if so, we fashion a remedy.

21 THE COURT: Thanks, folks.

22 MR. SCHNAPP: Thank you, your Honor.

23 MR. HERZFELD: Judge, can I just get a direction on  
24 those emails with dates and times and the one email to show  
25 that it was from Fell's account?

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1 THE COURT: Yes, I'd like those produced.

2 MR. HERZFELD: Okay.

3 THE COURT: And I think it would be helpful to produce  
4 them to the Court.

5 MR. HERZFELD: So just file it ECF?

6 THE COURT: Yes.

7 MR. SCHNAPP: Your Honor, if that in fact happens,  
8 then are we allowed to point out the fact that, now based upon  
9 the proceeding today and based upon the emails, can we repoint  
10 out the fact that there is spoliation, perhaps seek additional  
11 sanctions because of the difference between the emails, if  
12 we're able to show that those dates and times have been  
13 intentionally deleted?

14 THE COURT: So you're saying there's spoliation  
15 because the initial ones were altered?

16 MR. SCHNAPP: Yes, your Honor. I mean, I think we've  
17 had an admission here today, for some reason apparently

18 87ilpurc (2).txt  
18 plaintiff's prior counsel had deleted the times and dates, and  
19 I think on some level that does result in spoliation.

20 THE COURT: Well, I mean, it's not your classic case  
21 of spoliation because obviously the evidence hasn't been  
22 destroyed.

23 MR. SCHNAPP: Well, your Honor, I think we pointed out  
24 in our papers that spoliation can occur when there's alteration  
25 of the evidence, and I think the alteration is relevant and the

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1 prejudice to us, because to the extent the ECPA may apply, it  
2 deals with the contemporaneous issue, and we know exactly which  
3 emails were taken contemporaneously with the erasing of the  
4 time and date.

5 THE COURT: How do you know when? This won't tell you  
6 which ones were taken contemporaneously, will it?

7 MR. SCHNAPP: Well, we'll know, for example, that on  
8 April 28, 2008, that's when they were printed out, at the very  
9 least.

10 THE COURT: Right.

11 MR. SCHNAPP: We can then cross-reference those  
12 against the emails and the times and dates of those emails  
13 because many of those emails are from the March/April time  
14 period.

15 THE COURT: What I would say is this: I would  
16 suggest, since you haven't had this evidence, if you want to do  
17 a three-page supplement to your submissions based on this  
18 evidence, you can do that and get it in by next Wednesday.

19 MR. SCHNAPP: Yes, your Honor.

20 MR. HERZFELD: I won't be getting these out until  
Page 32

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21 Monday, just so you know.

22 THE COURT: okay.

23 MR. SCHNAPP: We can put in a letter to the Court by  
24 next wednesday, no longer than three pages.

25 THE COURT: okay.

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1 MR. HERZFELD: And just so the record is clear, I  
2 haven't conceded anything. I don't know what happened with  
3 prior counsel, I don't know if he enlarged it and it got cut  
4 off, I don't know if he intentionally did it, I don't know what  
5 happened. If there's an issue between client and counsel, I  
6 will try.

7 THE COURT: Okay. Thanks, folks.

8 ALL COUNSEL: Thank you.

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>UNITED STATES OF AMERICA</b>	<b>:</b>	<b>DATE FILED:</b>
<b>v.</b>	<b>:</b>	<b>CRIMINAL NO.</b>
<b>LAWRENCE MENDTE</b>	<b>:</b>	<b>CHARGES: 18 U.S.C.</b>
	<b>:</b>	<b>§ 1030(a)(2)(C) and(c)(2)(B)</b>
	<b>:</b>	<b>(intentionally accessing a protected</b>
	<b>:</b>	<b>computer without authorization</b>
	<b>:</b>	<b>and thereby obtaining information</b>
	<b>:</b>	<b>in furtherance of a tortious act –</b>
	<b>:</b>	<b>1 count)</b>

**INFORMATION**

**THE UNITED STATES ATTORNEY CHARGES THAT:**

**INTRODUCTION**

1. At all times relevant to this Information, defendant LAWRENCE MENDTE, a resident of Philadelphia, PA, was a news reporter, employed by KYW-TV in Philadelphia. KYW-TV was an affiliate of CBS, Inc.

2. Alycia Lane was employed by KYW-TV from in or about 2003 up to and including on or about January 1, 2008.

3. All employees at KYW were assigned an e-mail account that required the combination of a user name and a password to gain access to the account. Alycia Lane had such an e-mail account (“the KYW account”). The e-mail server for the KYW e-mail accounts was located in New York.

4. Alycia Lane also had two personal e-mail accounts – one with Apple Computer (“the .mac account”) and one with Yahoo! (“the Yahoo account”). These accounts also required

the combination of a username and a password to gain access to them. The e-mail servers for .mac and Yahoo accounts are located in California.

5. Beginning as early as in or about March 2006, and continuing up to and including on or about May 28, 2008, defendant LAWRENCE MENDTE gained access to these e-mail accounts of Alycia Lane and read her e-mail messages. When he did this, defendant MENDTE was not authorized by Ms. Lane, or anyone else, to access these e-mail accounts.

THE HISTORY OF UNAUTHORIZED ACCESS TO ALYCIA LANE'S E-MAIL ACCOUNTS

6. In or about March 2006, defendant LAWRENCE MENDTE accessed Alycia Lane's Yahoo account without authorization and printed an e-mail message from that account, which he saved.

7. In or about June 2006, defendant LAWRENCE MENDTE accessed Alycia Lane's KYW account without authorization and printed two e-mail messages from that account, which he saved.

8. In or about April 2007, Alycia Lane, using her .mac account, sent several photographs of herself with friends at a beach to another friend.

9. In or about April 2007, the wife of the friend sent an e-mail to Alycia Lane about these photographs.

10. On or about May 29, 2008, defendant LAWRENCE MENDTE possessed, on a computer that was inside his home, the text of the e-mail sent by the wife of the friend referred to in Paragraph 9 and several of the photographs referred to in Paragraph 8.

11. On or about May 29, 2008, defendant LAWRENCE MENDTE possessed, on a computer that was inside his home, e-mails from Alycia Lane's .mac account that had been sent in February 2007.

12. Beginning on or about January 1, 2008 and continuing to on or about May 28, 2008, defendant LAWRENCE MENDTE accessed Alycia Lane's .mac account without authorization approximately 452 times, from his home, from KYW, and from other places, as follows:

DATE	TIME	LOCATION
1/1/2008	10:25 AM	EST Residence
1/1/2008	7:55 PM	EST KYW
1/1/2008	8:22 PM	EST KYW
1/1/2008	10:09 PM	EST KYW
1/2/2008	10:21 AM	EST Residence
1/2/2008	2:37 PM	EST Residence
1/2/2008	5:10 PM	EST KYW
1/2/2008	6:23 PM	EST KYW
1/2/2008	1:16 AM	EST Residence
1/3/2008	10:57 AM	EST Residence
1/3/2008	12:05 PM	EST Residence
1/3/2008	1:13 PM	EST Residence
1/3/2008	5:35 PM	EST KYW
1/3/2008	7:50 PM	EST KYW
1/3/2008	9:06 PM	EST KYW
1/3/2008	12:34 AM	EST Residence
1/3/2008	12:35 AM	EST Residence
1/4/2008	3:11 AM	EST Residence
1/4/2008	11:08 AM	EST Residence
1/4/2008	11:30 AM	EST Residence
1/4/2008	3:29 PM	EST KYW
1/4/2008	6:34 PM	EST KYW
1/4/2008	8:06 PM	EST KYW
1/4/2008	10:05 PM	EST KYW
1/4/2008	10:53 PM	EST KYW
1/4/2008	1:25 AM	EST Residence

DATE	TIME	LOCATION
1/5/2008	11:21 AM	EST Residence
1/5/2008	1:01 PM	EST Residence
1/5/2008	1:44 PM	EST Residence
1/5/2008	2:40 PM	EST Residence
1/5/2008	8:08 PM	EST Residence
1/5/2008	11:14 PM	EST Residence
1/5/2008	1:27 AM	EST Residence
1/6/2008	12:23 PM	EST Residence
1/6/2008	3:59 PM	EST Residence
1/6/2008	5:18 PM	EST Residence
1/6/2008	9:23 PM	EST Residence
1/6/2008	10:31 PM	EST Residence
1/6/2008	1:16 AM	EST Residence
1/7/2008	1:11 PM	KYW
1/7/2008	2:40 PM	KYW
1/7/2008	6:32 PM	KYW
1/7/2008	7:41 PM	KYW
1/7/2008	9:17 PM	KYW
1/7/2008	10:40 PM	KYW
1/8/2008	11:31 AM	EST Residence
1/8/2008	12:29 PM	EST Residence
1/8/2008	1:17 PM	EST Residence
1/8/2008	1:55 PM	EST Residence
1/8/2008	3:51 PM	EST KYW
1/8/2008	5:06 PM	EST KYW
1/8/2008	5:44 PM	EST KYW
1/8/2008	1:26 AM	EST Residence
1/8/2008	2:11 AM	EST Residence
1/9/2008	10:51 AM	EST Residence
1/9/2008	12:46 PM	EST Residence
1/9/2008	3:19 PM	EST KYW
1/9/2008	5:40 PM	EST KYW
1/9/2008	7:25 PM	EST KYW
1/9/2008	7:45 PM	EST KYW
1/9/2008	10:19 PM	EST KYW
1/9/2008	12:17 AM	EST KYW
1/9/2008	1:34 AM	EST Residence
1/10/2008	9:47 AM	EST Residence
1/10/2008	10:36 AM	EST Residence
1/10/2008	11:24 AM	EST Residence

DATE	TIME	LOCATION
1/10/2008	5:54 PM	EST KYW
1/10/2008	5:54 PM	EST KYW
1/10/2008	10:15 PM	EST KYW
1/10/2008	10:56 PM	EST KYW
1/11/2008	11:13 AM	EST Residence
1/11/2008	12:02 PM	EST Residence
1/11/2008	5:28 PM	EST KYW
1/11/2008	10:11 PM	EST KYW
1/12/2008	1:04 PM	EST Residence
1/13/2008	1:36 PM	EST Residence
1/13/2008	9:42 PM	EST Residence
1/13/2008	12:58 AM	EST Residence
1/14/2008	12:10 PM	EST Residence
1/14/2008	1:27 PM	EST Residence
1/14/2008	4:06 PM	EST KYW
1/14/2008	4:50 PM	EST KYW
1/14/2008	5:02 PM	EST KYW
1/14/2008	9:21 PM	EST KYW
1/14/2008	10:20 PM	EST KYW
1/15/2008	3:36 PM	EST KYW
1/15/2008	5:15 PM	EST KYW
1/15/2008	5:48 PM	EST KYW
1/15/2008	7:54 PM	EST KYW
1/15/2008	9:35 PM	EST KYW
1/15/2008	2:09 AM	EST Residence
1/16/2008	10:06 AM	EST Residence
1/16/2008	1:41 PM	EST Residence
1/16/2008	3:49 PM	EST KYW
1/16/2008	10:11 PM	EST KYW
1/16/2008	10:59 PM	EST KYW
1/17/2008	9:54 AM	EST Residence
1/17/2008	11:37 AM	EST Residence
1/17/2008	12:40 PM	EST Residence
1/17/2008	3:23 PM	EST KYW
1/17/2008	4:46 PM	EST KYW
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1/17/2008	5:31 PM	EST KYW
1/17/2008	10:52 PM	EST KYW
1/18/2008	10:54 AM	EST Residence
1/18/2008	12:02 PM	EST Residence

DATE	TIME	LOCATION
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1/18/2008	10:49 PM	KYW
1/18/2008	1:10 AM	Residence
1/19/2008	2:00 PM	Residence
1/19/2008	3:53 PM	Residence
1/19/2008	1:24 AM	Residence
1/20/2008	12:26 AM	Residence
1/21/2008	10:23 AM	Residence
1/21/2008	3:28 PM	KYW
1/21/2008	5:07 PM	KYW
1/21/2008	1:00 AM	Residence
1/22/2008	3:03 AM	Residence
1/22/2008	10:30 AM	Residence
1/22/2008	3:27 PM	KYW
1/22/2008	4:31 PM	KYW
1/22/2008	5:28 PM	KYW
1/22/2008	5:47 PM	KYW
1/22/2008	6:07 PM	KYW
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1/22/2008	8:51 PM	KYW
1/22/2008	9:57 PM	KYW
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1/22/2008	10:49 PM	KYW
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1/23/2008	4:47 PM	KYW
1/23/2008	5:03 PM	KYW
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1/23/2008	10:14 PM	KYW
1/23/2008	10:54 PM	KYW
1/23/2008	11:11 PM	KYW
1/23/2008	12:54 AM	Residence
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1/24/2008	10:48 AM	Residence
1/24/2008	11:42 AM	Residence

DATE	TIME	LOCATION
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1/24/2008	10:45 PM	EST KYW
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2/7/2008	1:02 PM	EST Residence
2/7/2008	7:08 PM	EST KYW

DATE	TIME	LOCATION
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2/8/2008	11:29 AM	Residence
2/8/2008	9:33 PM	KYW
2/9/2008	11:47 AM	Residence
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2/13/2008	4:23 PM	KYW
2/13/2008	11:04 PM	KYW
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2/14/2008	10:51 PM	KYW
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2/21/2008	4:10 PM	KYW
2/22/2008	11:44 AM	Residence
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3/12/2008	4:18 PM	EDT KYW
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DATE	TIME	LOCATION
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3/17/2008	11:03 AM	EDT Residence
3/17/2008	9:30 PM	EDT KYW
3/18/2008	12:23 PM	EDT Residence
3/18/2008	9:37 PM	EDT KYW
3/19/2008	10:38 AM	EDT Residence
3/19/2008	12:26 PM	EDT Residence
3/19/2008	4:08 PM	EDT KYW
3/19/2008	8:16 PM	EDT KYW
3/19/2008	11:56 PM	EDT Residence
3/20/2008	12:15 PM	EDT Residence
3/20/2008	4:22 PM	EDT KYW
3/21/2008	10:58 AM	EDT Residence
3/21/2008	5:49 PM	EDT KYW
3/21/2008	10:47 PM	EDT KYW
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3/22/2008	5:31 PM	EDT Residence
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3/23/2008	12:03 AM	EDT Residence
3/24/2008	2:27 PM	EDT KYW
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3/25/2008	12:34 AM	EDT Residence
3/25/2008	12:44 AM	EDT Residence
3/26/2008	7:51 PM	EDT Residence
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4/4/2008	9:52 PM	EDT KYW
4/7/2008	10:52 AM	EDT Residence
4/8/2008	4:34 PM	EDT KYW

DATE	TIME	LOCATION
4/8/2008	10:48 PM	EDT KYW
4/9/2008	12:17 PM	EDT Residence
4/10/2008	7:44 PM	EDT KYW
4/10/2008	12:14 AM	EDT Residence
4/13/2008	7:58 PM	EDT Residence
4/17/2008	12:03 AM	EDT Residence
4/18/2008	9:18 PM	EDT KYW
4/20/2008	11:37 PM	EDT Residence
4/21/2008	6:46 PM	EDT KYW
4/24/2008	2:42 PM	EDT KYW
4/25/2008	7:20 PM	EDT KYW
4/26/2008	5:33 PM	EDT Residence
4/26/2008	11:54 PM	EDT Residence
4/27/2008	11:15 PM	EDT Residence
4/28/2008	12:34 PM	EDT Residence
4/29/2008	12:37 AM	EDT Residence
4/29/2008	4:35 PM	EDT KYW
4/29/2008	9:43 PM	EDT KYW
4/30/2008	9:25 AM	EDT Residence
4/30/2008	10:21 PM	EDT KYW
5/1/2008	11:50 PM	EDT KYW
5/2/2008	11:38 AM	EDT Residence
5/2/2008	11:57 PM	EDT KYW
5/3/2008	3:50 PM	EDT KYW
5/5/2008	6:30 PM	EDT KYW
5/5/2008	7:35 PM	EDT KYW
5/6/2008	8:51 AM	EDT Residence
5/6/2008	9:49 AM	EDT Residence
5/6/2008	10:11 AM	EDT Residence
5/6/2008	12:02 PM	EDT Residence
5/6/2008	6:41 PM	EDT KYW
5/6/2008	9:08 PM	EDT KYW
5/7/2008	5:03 PM	EDT KYW
5/7/2008	8:55 PM	EDT Residence
5/7/2008	9:50 PM	EDT KYW
5/8/2008	1:11 AM	EDT Residence
5/8/2008	8:53 AM	EDT Residence
5/8/2008	2:01 PM	EDT KYW
5/8/2008	2:05 PM	EDT KYW
5/8/2008	10:25 PM	EDT KYW

DATE	TIME	LOCATION
5/9/2008	5:19 PM	KYW
5/9/2008	9:49 PM	KYW
5/12/2008	9:57 PM	EDT
5/13/2008	5:08 PM	EDT
5/15/2008	8:09 AM	EDT
5/15/2008	7:27 PM	EDT
5/16/2008	5:09 PM	EDT
5/16/2008	5:18 PM	EDT
5/18/2008	8:59 PM	EDT
5/19/2008	10:02 PM	EDT
5/21/2008	7:55 AM	EDT
5/21/2008	5:18 PM	EDT
5/22/2008	12:25 AM	EDT
5/22/2008	5:02 PM	EDT
5/23/2008	2:53 PM	EDT
5/23/2008	4:34 PM	EDT
5/24/2008	8:31 PM	EDT
5/25/2008	12:11 PM	EDT
5/25/2008	9:15 PM	EDT
5/25/2008	11:21 PM	EDT
5/26/2008	1:30 PM	EDT
5/26/2008	6:59 PM	EDT
5/26/2008	9:28 PM	EDT
5/26/2008	9:35 PM	EDT
5/27/2008	7:11 PM	EDT
5/28/2008	3:40 PM	EDT
		KYW

13. Beginning on or about January 28, 2008 and continuing to on or about May 26, 2008, defendant LAWRENCE MENDTE accessed Alycia Lane's Yahoo account without authorization approximately 85 times, from his home, from KYW, and from other places, as follows:

DATE	TIME	LOCATION
1/28/2008	5:28 PM	EST
1/29/2008	4:17 PM	EST
		KYW

DATE	TIME		LOCATION
1/29/2008	5:17 PM	EST	KYW
1/30/2008	10:16 PM	EST	KYW
1/31/2008	5:19 PM	EST	KYW
1/31/2008	7:25 PM	EST	KYW
2/8/2008	10:29 AM	EST	Residence
2/11/2008	9:31 PM	EST	KYW
2/12/2008	10:24 PM	EST	KYW
2/14/2008	7:39 PM	EST	KYW
2/14/2008	10:55 PM	EST	KYW
2/15/2008	5:19 PM	EST	KYW
2/20/2008	7:38 PM	EST	KYW
2/23/2008	10:02 PM	EST	Residence
2/25/2008	8:39 PM	EST	KYW
2/26/2008	2:36 PM	EST	KYW
2/26/2008	5:18 PM	EST	KYW
2/26/2008	7:14 PM	EST	KYW
2/26/2008	9:46 PM	EST	KYW
2/27/2008	7:11 PM	EST	KYW
2/27/2008	7:36 PM	EST	KYW
2/29/2008	3:31 PM	EST	KYW
2/29/2008	5:26 PM	EST	KYW
2/29/2008	10:10 PM	EST	KYW
3/3/2008	2:11 PM	EST	KYW
3/3/2008	3:44 PM	EST	KYW
3/3/2008	9:29 PM	EST	KYW
3/4/2008	9:33 PM	EST	KYW
3/8/2008	11:15 PM	EST	Residence
3/8/2008	11:15 PM	EST	Residence
3/10/2008	6:57 PM	EDT	KYW
3/11/2008	5:01 PM	EDT	KYW
3/11/2008	6:01 PM	EDT	KYW
3/11/2008	7:36 PM	EDT	KYW
3/11/2008	8:40 PM	EDT	KYW
3/12/2008	5:17 PM	EDT	KYW
3/28/2008	7:50 PM	EDT	KYW
3/31/2008	10:59PM	EDT	KYW
4/1/2008	10:53AM	EDT	Residence
4/1/2008	3:44PM	EDT	KYW
4/3/2008	9:29PM	EDT	KYW
4/4/2008	10:51PM	EDT	KYW

DATE	TIME	LOCATION
4/8/2008	5:32 PM	EDT KYW
4/8/2008	11:03 PM	EDT KYW
4/10/2008	8:43 PM	EDT KYW
4/13/2008	8:56 PM	EDT Residence
4/17/2008	10:41 PM	EDT KYW
4/18/2008	3:44 PM	EDT KYW
4/21/2008	12:36 AM	EDT Residence
4/21/2008	7:42 PM	EDT KYW
4/21/2008	7:44 PM	EDT KYW
4/23/2008	11:18 AM	EDT Residence
4/24/2008	5:41 PM	EDT KYW
4/25/2008	7:10 PM	EDT KYW
4/26/2008	6:32 PM	EDT Residence
4/28/2008	1:42 PM	EDT Residence
4/29/2008	5:34 PM	EDT KYW
4/29/2008	10:51 PM	EDT KYW
4/30/2008	11:28 PM	EDT KYW
5/1/2008	12:51 AM	EDT Residence
5/1/2008	11:49 PM	EDT KYW
5/2/2008	10:56 PM	EDT KYW
5/3/2008	4:44 PM	EDT KYW
5/5/2008	7:29 PM	EDT KYW
5/5/2008	8:37 PM	EDT KYW
5/6/2008	10:09 PM	EDT KYW
5/7/2008	4:12 PM	EDT KYW
5/7/2008	10:51 PM	EDT KYW
5/8/2008	1:20 PM	EDT KYW
5/8/2008	3:04 PM	EDT KYW
5/8/2008	11:25 PM	EDT KYW
5/9/2008	10:50 PM	EDT KYW
5/12/2008	11:04 PM	EDT KYW
5/13/2008	6:07 PM	EDT KYW
5/15/2008	9:11 AM	EDT Residence
5/15/2008	8:27 PM	EDT KYW
5/16/2008	6:09 PM	EDT KYW
5/19/2008	11:01 PM	EDT KYW
5/21/2008	6:19 PM	EDT KYW
5/22/2008	5:57 PM	EDT KYW
5/23/2008	3:53 PM	EDT KYW
5/23/2008	5:34 PM	EDT KYW

DATE	TIME	LOCATION
5/24/2008	9:27 PM	EDT
5/26/2008	7:58 PM	EDT
5/26/2008	10:27 PM	EDT
		KYW

ALYCIA LANE'S CRIMINAL CASE

14. Alycia Lane was a defendant in a criminal case filed in New York (Manhattan), New York. The case involved charges arising from an alleged altercation between Alycia Lane and certain New York City police officers that allegedly occurred in December 2007. Alycia Lane's defense attorney in that matter entered into discussions with the Assistant District Attorney seeking a disposition, known as Adjournment in Contemplation of Dismissal (ACD). An ACD disposition results in a complete dismissal of the charges if the person complies with the terms and condition set by the court. It was important to the completion of those negotiations that the discussions regarding the ACD disposition remain confidential.

15. On or about January 25, 2008, at 3:28 PM (all times referred to are Eastern time), Alycia Lane's criminal attorney sent an e-mail message to her .mac account in which he discussed the consequences of an ACD disposition.

16. On or about February 1, 2008, at 3:41 PM, Alycia Lane sent an e-mail to another person reporting that her court date had been moved to February 25. (It had originally been listed on April 3). That person replied to Ms. Lane's .mac account on the same date at 4:44 PM.

17. Between on or about February 1, 2008 at 5:41 PM and on or about February 6, 2008 at 9:53 PM, defendant LAWRENCE MENDTE made the following unauthorized accesses to Alycia Lane's .mac account:

DATE	TIME	# E-MAILS READ	LOCATION
02/01/08	5:41PM	3	KYW
02/02/08	2:00AM	8	Residence
02/02/08	11:45AM	2	Residence
02/03/08	8:55PM	6	Residence
02/04/08	10:30PM	4	KYW
02/05/08	10:36AM	3	Residence
02/06/08	1:46 AM	0	Residence
02/06/08	11:15 AM	4	Residence
02/06/08	6:43 PM	0	KYW
02/06/08	9:53 PM	4	KYW

18. On or about February 6, 2008, between 3:11 PM and 7:00 PM, defendant LAWRENCE MENDTE made approximately two telephone calls to a reporter for the Philadelphia Daily News.

19. On or about February 6, 2008, the Daily News website carried a story by that reporter, stating that the date for Alycia Lane's criminal hearing had been changed.

20. On or about February 7, 2008, after an agreement for an ACD disposition was reached, Alycia Lane's criminal attorney sent her an e-mail that detailed how the proceeding would occur. At that time, the proposed disposition was not publicly known. The e-mail was sent at 11:25 AM to Ms. Lane's .mac account.

21. Between on or about February 7, 2008 at 1:02 PM and on or about February 8, 2008 at 9:33 PM, defendant LAWRENCE MENDTE made the following unauthorized accesses to Alycia Lane's .mac account:

DATE	TIME	# E-MAILS READ	LOCATION
02/07/08	1:02 PM	19	Residence
02/07/08	7:08 PM	4	KYW
02/07/08	9:00 PM	4	KYW
02/07/08	9:53 PM	0	KYW
02/08/08	10:27 AM	4	Residence
02/08/08	11:29 AM	2	Residence
02/08/08	9:33 PM	24	KYW

22. On or about February 8, 2008, between 7:09 PM and 9:00 PM, defendant LAWRENCE MENDTE made approximately two telephone calls to a reporter for the Philadelphia Daily News, and received one telephone call from the reporter.

23. On or about February 9, 2008, the Daily News website carried a story by the reporter, stating that he had heard from sources that Alycia Lane's attorney had reached an agreement with the District Attorney's office for an ACD disposition on March 6, 2008.

#### ALYCIA LANE'S CIVIL LITIGATION

##### The KYW Litigation

24. Alycia Lane had been terminated by KYW on January 1, 2008. Ms. Lane retained a civil attorney in Philadelphia to represent her in this matter.

25. On or about January 29, 2008, the Philadelphia civil attorney sent to Alycia Lane's criminal lawyer in New York, a draft of a Notice of Pre-Complaint Depositions that he planned to file and serve upon KYW in connection with her dismissal. The Philadelphia civil attorney sent a copy of the e-mail with the attachment to Ms. Lane at her .mac account at 9:08 AM.

26. Between on or about January 29, 2008, and on or about January 30, 2008, defendant LAWRENCE MENDTE made the following unauthorized accesses to Alycia Lane's .mac account:

DATE	TIME	# E-MAILS READ	LOCATION
01/29/2008	11:32 AM	3	Residence
01/29/2008	12:52 PM	6	Residence
01/29/2008	12:59 PM	2	Residence
01/29/2008	2:38 PM	2	Residence
01/29/2008	3:35 PM	4	KYW
01/29/2008	4:15 PM	0	KYW
01/29/2008	4:26 PM	0	KYW
01/29/2008	5:02 PM	0	KYW
01/29/2008	5:16 PM	0	KYW
01/29/2008	6:51 PM	0	KYW
01/29/2008	7:37 PM	0	KYW
01/29/2008	9:26 PM	2	KYW
01/29/2008	10:25 PM	10	KYW
01/30/2008	1:33 AM	9	Residence

27. Between on or about January 30, 2008 at 12:35 PM and on or about January 31, 2008 at 2:39 PM, defendant LAWRENCE MENDTE made approximately four telephone calls to a reporter for the Philadelphia Daily News.

28. On or about January 31, 2008, the Daily News website carried a story by the reporter, stating that Alycia Lane's attorney had filed a Praecept to issue a Writ of Summons

against CBS/KYW. The story also reported that Ms. Lane had asked to depose the President and News Director of KYW.

29. In addition to actions taken by Alycia Lane's Philadelphia civil attorney, Ms. Lane's union, the American Federation of Television and Radio Artists (AFTRA), was also involved in representational proceedings against KYW on her behalf.

30. Between on or about February 28, 2008, and on or about February 29, 2008, Alycia Lane's Philadelphia civil attorney and the attorney for AFTRA exchanged e-mail messages regarding a possible resolution of the union's claim and its impact upon Ms. Lane's separate, civil action.

31. On or about March 1, 2008, at 10:13 AM, Alycia Lane's Philadelphia civil attorney forwarded a thread of the e-mail exchanges between himself and the attorney for AFTRA to Ms. Lane at her Yahoo account.,

32. On or about March 3, 2008, defendant LAWRENCE MENDTE made the following unauthorized accesses to Alycia Lane's Yahoo account:

DATE	TIME	LOCATION
03/03/08	2:11 PM	KYW
03/03/08	3:44 PM	KYW
03/03/08	9:29 PM	KYW

33. Between on or about March 4, 2008 at 1:51 PM and on or about March 25, 2008 at 3:32 PM, defendant LAWRENCE MENDTE made approximately ten telephone calls to a reporter for the Philadelphia Daily News and received approximately two telephone calls from the reporter.

34. On or about March 26, 2008, the Daily News website carried a story by the reporter, stating that AFTRA was trying to help Alycia Lane get her job at KYW back.

The New York City Litigation

35. On or about March 5, 2008, at 10:13 PM, after Alycia Lane had accepted the ACD disposition in the New York criminal case, her New York attorney sent an e-mail to her .mac account notifying her that he would file a notice of claim against the City of New York for her arrest. A copy of the notice of claim form was attached to the e-mail.

36. The notice of claim was filed on or about March 6, 2008. As required by New York law, it was filed with the Comptroller of the City of New York, and not with any court.

37. Between on or about March 6, 2008 at 12:32 AM, and on or about March 13, 2008 at 11:23 PM, defendant LAWRENCE MENDTE made the following unauthorized accesses to Alycia Lane's .mac account:

DATE	TIME	# E-MAILS READ	LOCATION
03/06/08	12:32 AM	6	Residence
03/07/08	12:34 AM	5	Residence
03/07/08	11:02 PM	6	KYW
03/08/08	11:17 PM	0	Residence
03/08/08	11:23 AM	0	Residence
03/10/08	6:00 PM	6	KYW
03/10/08	12:36 PM	4	Residence
03/11/08	10:46 AM	14	Residence
03/11/08	11:04 AM	0	Residence
03/11/08	12:08 PM	0	Residence

DATE	TIME	# E-MAILS READ	LOCATION
03/11/08	12:17 PM	1	Residence
03/11/08	3:59 PM	2	KYW
03/11/08	5:03 PM	0	KYW
03/11/08	6:37 PM	0	KYW
03/11/08	7:41 PM	0	KYW
03/11/08	9:38 PM	0	KYW
03/12/08	9:31 AM	4	Residence
03/12/08	1:12 PM	2	Residence
03/12/08	4:18 PM	0	KYW
03/12/08	11:59 PM	1	Residence
03/13/08	7:37 AM	15	Residence
03/13/08	11:18 PM	1	Residence
03/13/08	11:23 PM	8	Residence

38. Between on or about March 6, 2008 at 11:18 AM, and on or about March 14, 2008 at 1:51 PM, defendant LAWRENCE MENDTE made approximately seven telephone calls to a reporter for the Philadelphia Daily News, and received approximately one telephone call from the reporter.

39. On or about March 14, 2008, the Daily News website carried a story by the reporter, stating that the notice of claim had been filed, on behalf of Alycia Lane.

#### THE CHARGE

40. Between in or about March 2006 and on or about May 28, 2008, in Philadelphia, in the Eastern District of Pennsylvania, and elsewhere, defendant

**LAWRENCE MENDTE,**

in furtherance of the commission of tortious acts within the Commonwealth of Pennsylvania and the State of New York, intentionally accessed the e-mail accounts of Alycia Lane on the computers of Apple Computer (.mac) and Yahoo!, without authorization, and intentionally exceeded authorized access to computers at KYW, and thereby obtained information from protected computers (.mac, Yahoo!, and KYW) by means of interstate communications.

In violation of Title 18, United States Code, Section 1030(a)(2)(C) and 1030(c)(2)(B)(ii).



LAURIE MAGID  
Acting United States Attorney